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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ARTHUR TAKEALL,

Petitioner,

v.

PEPSICO, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a federal court of appeals abuse its discretion in a copyright infringement case when it requires an appellant, who has demonstrated a "striking similarity" between the original work and the alleged infringing material, to also make more than a minimal showing that the alleged infringer had access to the original work?

2. By usurping a jury's function, does a federal district court violate a person's right to a jury trial guaranteed by the Seventh Amendment to the United States Constitution when it grants summary judgment against such person in a case involving numerous disputed material facts?

Note: Petitioner reserves the right to argue Question 3 below in the event certiorari is granted on the above questions, but does not include question 3 among the reasons for grant of certiorari.

3. Does a federal court of appeals abuse its discretion when it *sua sponte* determines that a work is not to be extended "protection" under the federal copyright law where (i) the district court had determined that the work possessed the creative requisites and originality so as to be afforded "protection"; (ii) the court of appeals did not find that the district court's decision was clearly erroneous, and (iii) the appellee had not filed a cross-appeal with respect to the issue of copyright "protection"?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF CASE	3
REASONS FOR GRANTING THE WRIT	8
1. The decision by the Fourth Circuit to require a plaintiff, who has made a showing of "striking similarity" on a federal question of copyright infringement to also provide strong proof of "access" conflicts with the decisions of other circuits.	8
2. By granting summary judgment despite the existence of numerous disputed facts, the district court usurped the role of the jury and thereby violated petitioner's seventh amendment right to a trial by jury.	13
CONCLUSION	19
APPENDIX A (Opinion and Judgment of the District Court of Appeals, and District Court; Pertinent Constitutional and Statutory Provisions)	A1

TABLE OF AUTHORITIES

Cases:	**Page**
Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)	13, 14, 15
Arnestein v. Porter, 154 F.2d 464 (1946)	10
Celotex Corp. v. Catrett, 477 U.S. 317 (1986)	13, 14
Erie Insurance Exchange v. Stark, 962 F.2d 349 (4th. Cir. 1992)	15
Evans v. Wallace Berrie & Co., Inc., 681 F. Supp. 813 (S.D. Fla. 1988)	12
Gaste v. Kaiserman, 803 F.2d 1061 (2d Cir. 1988)	*passim*
Roy Expert Co. v. Columbia Broadcasting System, 503 F. Supp. 1137 (S.D.N.Y.), *aff'd*, 673 F.2d 1045 (2d Cir. 1982)	12
Selle v. Gibb, 741 F.2d 896 (7th Cir. 1984)	9, 12
Takeall v. Pepsico, 809 F. Supp. 19 (1992)	*passim*
Takeall v. Pepsico, CA-92-766-S, unpublished (4th Cir. Dec. 8, 1993)	*passim*
Tuck v. Henkel Corp., 973 F.2d 371 (4th Cir. 1992)	15

Rules and Statutes:

Fed. R. Civ. P. 56	6, 14, 15, 20
17 U.S.C. § 501	2
28 U.S.C. § 1254	2
28 U.S.C. § 1338	2

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The petitioner Arthur Takeall respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in the above-titled proceeding on December 8, 1993.

OPINIONS BELOW

The unpublished *per curiam* decision of the United States Court of Appeals for the Fourth Circuit is reprinted in the Appendix hereto. (App.1-16) Similarly, the circuit court's Memorandum Denying Petitioner's Petition for Rehearing with Suggestion for Rehearing En Banc is also reprinted in the Appendix. (App. 17)

The opinion of the United States District Court for the District of Maryland is reported at 809 F. Supp. 19 (1992), and is also reprinted in the Appendix. (App. 18-25)

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. § 1338(a) and (b), the petitioner brought this suit in the United States District Court for the District of Maryland. On December 23, 1992, that court granted respondent's motion for summary judgment.

On Petitioner's appeal, the Fourth Circuit on December 8, 1993, entered a judgment and unpublished *per curiam* opinion affirming the district court's decision. Petitioner filed, on December 21, 1993, a petition for rehearing and suggestion for rehearing en banc, which was denied by the Fourth Circuit on January 5, 1994.

On March 24, 1994, Petitioner filed with this Court an Application for an Extension to File a Petition for Writ of Certiorari. The time for filing was extended to May 5, 1994, and this Petition For A Writ of Certiorari is being filed consistent with this Court's Order. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(l).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment to the United States Constitution is set forth in the Appendix, p. 26. The relevant provision of the federal copyright law, *viz*: 17 U.S.C. § 501 is also set forth in the Appendix, pp. 27-28.

STATEMENT OF THE CASE

This matter comes before the Court on Arthur Takeall's ("Takeall's") Petition For A Writ of Certiorari following affirmation by the United States Court of Appeals for the Fourth Circuit of a decision and order of the United States District Court for the District of Maryland granting summary judgment to Respondent PepsiCo, Inc. ("PepsiCo") in a federal copyright infringement action brought by Takeall. Takeall's complaint

alleged, *inter alia*, that PepsiCo had unlawfully appropriated his original work: "You Got The Right One, Uh Huh!" as the key component in its massive advertising campaign to promote the company's soft drink Diet Pepsi. The campaign featured well-known entertainer Ray Charles and the jingle "You Got The Right One, Baby, Uh Huh!" PepsiCo first aired television commercials featuring the jingle during the broadcast of the Super Bowl in January 1991.

The Diet Pepsi "Uh-Huh" commercials have won numerous advertising awards, including the American Marketing Association award for advertising effectiveness. In early 1991, PepsiCo diverted all of its remaining Diet Pepsi advertising budget into the "Uh-Huh" campaign. By every academic and industry survey of brand recognition, product loyalty, consumer entertainment, and diet-soft-drink-market-share-retention, the "You Got The Right One, Uh-Huh" Campaign has been the most spectacular in the history of advertising. The campaign continues as of the date of this Petition.

Takeall, although much-less well known than Ray Charles, has been a performer since childhood when, as a boy, he learned ventriloquism and began performing for small fees at birthday parties and children's shows. As a young man, Takeall joined the Air Force and was stationed in West Germany where he and his dummy-partner "Scooter" initially performed in Air Force talent shows and later in G.I shows and night clubs in West Germany and in Luxembourg. Takeall had been preceded in his role as an Air Force ventriloquist by one Willie Tyler, another African-American ventriloquist, and his dummy-partner Lester. To distinguish himself and Scooter from Willie and Lester, Takeall began to use in his act the tag lines "We're The Right One" and "You Got The Right One, Uh-Huh!" When he was discharged from the Air Force in 1968, Takeall returned to the states and began regularly performing with Scooter as a ventril-

oquist on radio broadcasts. Takeall worked at over 25 radio stations in 12 states in some 23 radio markets.

Peter Cofield, whom PepsiCo alleges created for the company: "You Got The Right One, Baby, Uh-Huh!" was a student in Trenton, New Jersey, when Takeall served as guest disc jockey at Trenton's WTNJ radio.

Takeall enjoyed a certain amount of limited notoriety as he and Scooter became radio and show personalities, performing as the opening act for such comedians and musical stars as Redd Foxx, Tony Orlando, and the Chi-lites. In 1970, 1971 and 1977, Takeall was Billboard Magazine's Radio Personality of the Year for the disc jockey category and region.

Takeall used the slogan "You Got The Right One, Uh-Huh!" repeatedly in his radio career and in live ventriloquist performances — not only in the 1970s — but in the 1980s and 1990s as well. This uninterrupted long-term use by Takeall of "You Got The Right One, Uh-Huh!" is corroborated by the testimony of Cynthia Davidson and others who have so stated in sworn depositions and affidavits. Takeall also produced an audio tape of his use of the slogan recorded from a radio broadcast he made from Baton Rouge, Louisiana in 1984.

Further, Takeall used "You Got The Right One, Uh-Huh!" in appearances with Colonel Harlen Sanders of Kentucky Fried Chicken (now KFC, Inc., a PepsiCo company) in 1977 as part of radio promotions in Las Vegas. By any measure, the forgoing jingle was an integral feature of Takeall's act and a distinctive part of his performances. This was so much so that, in 1984, Takeall was invited to perform as an ambassador of good will and public relations entertainer at the New Orleans World's Fair. He gave performances at the African-American pavilion and did spot performances with Scooter in a World's Fair golf cart. The World's Fair put out a press release about Takeall and Scooter, stating that the audience will know they have come to the correct

pavilion when they hear Scooter say: "You Got The Right One, Uh-Huh."

Subsequent to the 1984 New Orleans World's Fair, Takeall began working with young people across America in a crusade against illicit drug use. Rather than continue to perform in clubs and as a disc jockey, Takeall toured the country performing at schools and Job Corps campuses around the country. Between 1985 and 1991, Takeall and Scooter performed at one or two Job Corps centers and/or schools per week, averaging some 45 weeks per year on tour.

In December 1986, Takeall performed on national television on Pat Robertson's 700 Club, on the Christian Broadcast Network.

Beginning in 1988, Takeall attempted, on three separate occasions, to market his ventriloquist act and its signature "You Got The Right One, Uh-Huh!" slogan to PepsiCo and to its divisions Pizza Hut and KFC — all as part of his effort to get better funding for his Job Corps and youth group anti-drug tour: in 1988 to Brady Keyes, the company's largest minority Kentucky Fried Chicken franchisee and a person who had been heavily involved in creating the "Have It Your Way" campaign for Burger King; in 1989 to Barry Johnson, a community affairs executive with Pizza Hut, who remembered meeting Takeall; and in June 1989 in a written response to a specific minority business solicitation placed by PepsiCo in the June 1989 edition of Black Enterprise magazine. The June 1989 solicitation was sent by Takeall to Pepsi Baltimore complete with a notarized statement of Mr. Takeall's belief in his exclusive right to use the "You Got The Right One, Uh-Huh" jingle.

On December 14, 1991, Takeall filed for his copyright and received the same. Takeall filed suit against Pepsico in the United States District Court for the District of Maryland on March 19, 1992 for copyright infringement seeking substantial compensation and an accounting, including a past and future

royalty on all uses of his copyright-registered ventriloquist act and his signature phrase "You Got The Right One, Uh-Huh".

Subsequent to discovery, PepsiCo filed a Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Takeall opposed Pepsico's Motion. Without a hearing, the district court, finding no issue of material fact in dispute, ordered the case dismissed. The district court ruled that, despite Takeall's evidentiary submissions from which "a reasonable fact-finder could conceivably find striking similarity" (App. 21; 809 F.Supp. at 22) between Takeall's copyrighted work and the PepsiCo jingle, Takeall had, nonetheless, failed to provide to the court sufficient evidence that PepsiCo had access to Takeall's copyrighted work so as to permit the inference that Pepsico had copied it. Takeall appealed the district court's decision to the United States Court of Appeals for the Fourth Circuit, which affirmed the lower court's decision. The court of appeals purportedly undertook a *de novo* review of the case and concluded, on carefully-culled "facts", that no facts material to the case were in dispute. The court of appeals overlooked or explained away numerous disputed factual issues, gave virtually no weight to the inferences to be drawn in favor of the protected party when "striking similarity" is present, virtually ignored Takeall's evidence of television, radio and public performances relating to "dissemination" and also of his submissions to Pepsico as such evidence would demonstrate "access" by Pepsico to copyrighted works, totally discounted the opinion of Takeall's expert witness and treated PepsiCo's bare denials of access and copying as truths. The court of appeals even went so far in *dicta* to offer its view that "the disputed phrase fails to evince the requisite degree of originality to entitle it to copyright protection and is a short expression of the sort that courts have uniformly held uncopyrightable." (App. 14).

In dissenting from the *per curiam* opinion, Judge Niemeyer chastised the court for wrongly usurping the function of the fact-finder:

> The majority dismisses the circumstantial evidence and inferences to be drawn from it as "pure speculation." Nonetheless, placing the line between where reasonable inference from circumstantial evidence ends and where speculation begins is a function for the factfinder.
>
> Finally, I cannot fail to observe that the majority's very discussion in reviewing the district court's opinion betrays the improper role undertaken by the district court and ours. On page 9 of the majority opinion, it is stated, "We hold that the district court's finding of insufficient evidence to show dissemination was not clearly erroneous and must be sustained."
>
> While Takeall's burden of proof to show that Pepsico copied his phrase may prove to be insurmountable in the end, in my judgment, he presented enough at this stage of the proceedings to create a factual issue. I would reverse the judgment of the district court and, therefore, I respectfully dissent.

(App. 16, J. Niemeyer, dissenting).

Takeall thereupon filed a Petition for Rehearing and a Suggestion for Rehearing En Banc which was also denied. (*See* App. 17). It is from this denial that the instant Petition arises.

REASONS FOR GRANTING THE WRIT

1. The Decision By The Fourth Circuit To Require A Plaintiff, Who Has Made A Showing Of "Striking Similarity" On A Federal Question Of Copyright Infringement, To Also Provide Strong Proof Of "Access" Conflicts With The Decisions Of Other Circuits.

Arthur Takeall's case was brought for redress of PepsiCo's alleged copyright infringement of his original work: "You got the right one, Uh-Huh" by means of that company's multi-million-dollar promotion of its soft drink Diet Pepsi using the jingle "You got the right one, Baby, Uh-Huh." No one disputes that Takeall's work was first-in-time, that he performed the work publicly, that the voice inflections used by Ray Charles in the Diet Pepsi promotion were the same as those used by Takeall in his act, or that Takeall created his own work. The district court found that Takeall had "submitted performance tapes and expert testimony from which a reasonable fact-finder could conceivably find striking similarity . . . " (App. 21; 809 F. Supp. at 22).

Had Takeall initiated this case in a federal district court located in the Second Circuit, as he could have, he likely would be proceeding toward a trial. Instead, because he filed suit in the United States District Court for the District of Maryland, he now finds himself in the unenviable position of petitioning this Court for the opportunity to be heard since summary judgment has been granted against him. This disparity of treatment afforded a complainant in the Second Circuit when contrasted with a similarly-situated plaintiff filing in the Fourth Circuit is resultant of the presumption afforded a plaintiff in the former forum in circumstances where a "striking similarity" exists between the original work and the alleged infringing work.

In *Gaste v. Kaiserman*, 803 F.2d 1061 (2d Cir. 1988), the United States Court of Appeals for the Second Circuit approved as a correct statement of the law, the following jury instruction:

> Now, there is one circumstance in which access does not have to be proven. If the two works, that is the copyrighted work and the allegedly infringing work, are what we call strikingly similar, then access does not have to be proven.
>
> By striking similarity what we mean is that the two songs are so much alike that the only reasonable explanation for such a great degree of similarity is that the later song was copied from the first. In other words, if they are so nearly alike that it is virtually inconceivable that the second was independently composed without knowledge of the first then you may find that there was infringement without finding actual access.
>
> In other words, you are in effect presuming access from the fact of striking similarity.
>
> So what you will have to decide is whether or not the songs are so much alike that it is virtually inconceivable that Feelings was independently composed without any derivation from Pour Toi.
>
> That issue as to whether the two works are strikingly similar in the sense that I have defined, in other words, so as to preclude any reasonable possibility of independent creation, is an issue which is to be determined by you on the basis of all of the evidence, including the expert testimony.

The alleged infringer in *Gaste* had argued that to employ such a standard in a case involving "strikingly similar" works, would negate the defense of independent creation for an author who actually creates such a similar work. Relying on *Selle v. Gibb*, 641 F.2d 896 (7th Cir. 1984), the alleged infringer had urged the court to require additional evidence establishing a "reasonable possibility" of access by the infringer to the copyrighted work

in order to establish a violation of the copyright law. In the face of that argument, the *Gaste* court held:

> In this Circuit, the test for proof of access in cases of striking similarity is less rigorous. In *Arnestein v. Porter*, 154 F.2d 464 (1946), Judge Frank said, "In some cases, the similarities between the appellant's and appellees work are so extensive and striking as, without more, both to justify an inference of copying and to prove improper appropriation." *Id.* at 468-69.

The *Gaste* court went on to state:

> We also conclude that there was sufficient evidence to permit the jury to infer access based on striking similarity. Gaste's proof of striking similarity consisted of both aural renditions of the songs and expert testimony. Gaste's expert testified not merely to common musical phrases in the songs but said that "there is not one measure of 'Feelings' which . . . cannot be traced back to something which occurs in 'Pour Toi'" He also pointed to a unique musical "fingerprint" — an "evaded resolution" — that occurred in the same place in the two songs. The witness said that while modulation from a minor key to its relative major was very common, he had never seen this particular method of modulation in any other composition.

Id. at 1063.

The district court, in the instant case, grudgingly acknowledged that Takeall had "submitted performance tapes and expert testimony from which a reasonable fact-finder could *conceivably* find striking similarity" (App. 21; 809 F.Supp. at 22)(emphasis added). Takeall's showing on this issue was much stronger than the district court's acknowledgement would suggest. The PepsiCo jingle contains exactly the same words as does Takeall's work, and uses Takeall's timing, rhythm, ges-

tures, and call and response technique. Moreover, the PepsiCo jingle does not always include the word "Baby" (*See* Exhibit 41, Pg. 287 of Court of Appeals Joint Appendix). Takeall, on the other hand, testified at deposition that he sometimes uses the words "Baby" or "Sugar" before the "Uh-Huh" part of the copyrighted work.

As in the *Gaste* case, one of Takeall's witnesses, Professor Steven Strunk of Catholic University, an expert in composition and jazz as well as an accomplished pianist gave sworn testimony on the technical aspects of the striking similarities between Takeall's act and the Diet Pepsi commercials that use the "You Got The Right One, Baby, Uh-Huh!" theme. (*See* Exhibit 57, Pg. 220 of Court of Appeals Joint Appendix). Professor Strunk's expert opinion is that, in addition to the fact that the wording of Takeall's copyrighted work and the PepsiCo jingle are a near-perfect match, there are striking similarities between the PepsiCo commercial spots and Takeall's performances. Professor Strunk analyzed and scored the PepsiCo commercials and Takeall's performance tapes with respect to pitch, rhythm, musical contour, voice tambour, spacing and pause between similar words in the two sets of works, the call and response techniques used in both, and the gestures timed to certain notes and beat made by Takeall and Scooter and by the performers in the PepsiCo commercials. From this analysis, Professor Strunk was able to conclude that the PepsiCo commercials and Takeall's prior-performance tapes were substantially and strikingly similar.

Despite the district court's assumption of "striking similarity", which finding the Fourth Circuit did not disturb on appeal, the district court chose not to follow the holding in *Gaste*. Thus, Takeall's claim was ordered dismissed on summary judgment because the court reasoned that Takeall had provided insufficient evidence of a reasonable possibility of access to his work by the creators of the Diet Pepsi commercials. (App. 23; 809

F.Supp at 22-23). The Fourth Circuit affirmed the district court's decision on the same grounds (App. 11).

Gaste, of course, is by no means the sole federal court holding inconsistent with the Fourth Circuit's burden of proof requirements in cases involving "striking similarity".[1] For example, in *Evans v. Wallace Berrie & Co, Inc.*, 681 F. Supp. 813 (S.D. Fla. 1988), the United States District Court for the Southern District of Florida employed a sliding-scale with respect to the burden of proof in infringement cases such that if "striking similarity" is demonstrated, only a minimal burden of showing "access" is required.

In *Selle v. Gibb*, 741 F.2d 896 (7th Cir. 1984), the court articulated a similar sliding-scale standard:

> [S]triking similarity is just one piece of circumstantial evidence tending to show access and must not be considered in isolation; it must be considered together with other types of circumstantial evidence relating to access . . . Thus, although it has frequently been written that striking similarity *alone* can establish access, the decided cases suggest that this circumstance would be most unusual. The plaintiff must always present sufficient evidence to support a reasonable possibility of access because the jury cannot draw an inference of access based upon speculation and conjecture alone. The plaintiff must still show some minimum threshold of proof which demonstrates that the inference of access is reasonable.

Id. at 901 (emphasis in original).

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[1] It is settled law that direct evidence of copying need not be shown. An aggrieved party may, instead, rely on circumstantial evidence to prove its case. *See Roy Export Co. v. Columbia Broadcasting System*, 503 F.Supp. 1137 (S.D.N.Y.), *aff'd*, 673 F.2d 1045(2d Cir. 1982).

In the instant matter, both the district court and the court of appeals, while paying lipservice to the legal concept of "striking similarity", assigned virtually no weight to this linchpin of the evidentiary components. When coupled with the showings by Takeall of access to his work by PepsiCo — including evidence of his widespread public appearances over a period of years, his numerous radio and television appearances and three separate submissions of his jingle to PepsiCo and its subsidiaries, the failure of the lower courts here to credit that evidence points to an emerging conflict between the circuit courts of the federal system on a basic question of federal law.

The Petitioner respectfully requests this Court to settle this issue in order that there will be uniformity for both plaintiff and defendant parties in copyright cases regardless of the venue.

2. By Granting Summary Judgment Despite the Existence of Numerous Disputed Facts, the District Court Unsurped the Role of the Jury and Thereby Violated Petitioner's Seventh Admendment Right to a Trial by Jury.

In granting respondent's motion for summary judgment, the court below found that even if Petitioner's jingle was "strikingly similar" to the slogan used by respondent to advertise its diet soda, Petitioner did not show sufficient evidence from which a reasonable fact finder could find that PepsiCo's agents had a reasonable possibility of access, either direct or indirect, to petitioner's slogan or his act.

Petitioner contends that *Takeall v. Pespco, Inc.*, No. 93-1237, unpublished *per curiam* opinion (4th Cir. December 8, 1993), *pet. for rehearing and hearing en banc denied* (January 5, 1994), directly contravenes the spirit of Federal R. Civ. P. 56, this Court's precedent in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) and *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) and has directly deprived him of his constitutional right under the Seventh Amendment to have a jury decide the facts

of his case. *Celotex* held that Rule 56 mandates the entry of summary judgment against a party who fails to make a sufficient showing of an essential element of that party's claim and on which the party will bear the burden of proof at trial. The Court added:

> In such a situation, there can be no genuine issue as to any material fact, since a *complete* failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. The moving party is "entitled to a judgment as a matter of law" because the non-moving party has failed to make a sufficient showing on an essential element of her case as a matter with respect to which she has the burden of proof.

Id. at 324.

Further, "[s]ummary judgment should not be granted unless it is clear that a trial is unnecessary and any doubt as to the existence of a genuine issue for the trial should be resolved against the moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 25. The party moving for summary judgment bears the burden of persuasion and must satisfy this burden in either of two ways. First, the moving party must submit affirmative evidence that negates an essential element of the non-moving party's claim. Second, the moving party may demonstrate to the court that the non-moving party's evidence is insufficient to establish an essential element of the non-moving party's claim.

Emphasizing that credibility determinations and drawing of legitimate inferences are *exclusively* within the province of the jury, the *Anderson* court stated:

> At the summary judgment stage, the trial judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial . . . In

> essence, the inquiry is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one sided that one party must prevail as a matter of law.

Id. at 242.

Further, the trial court, when deciding whether to grant summary judgment must afford the nonmoving party all favorable inferences that may fairly be drawn from the circumstances. In *Tuck v. Henkel Corp.*, 973 F.2d 371 (4th Cir. 1992), the Fourth Circuit reversed a grant of summary judgment in an age-discrimination case because plaintiff Tuck had anecdotal evidence that the defendant employer fired its employees before they reached retirement age, which the court expected to evolve into more probative evidence at trial. Likewise, in *Erie Insurance Exchange v. Stark*, 962 F.2d 349, 353 (4th Cir. 1992), the Fourth Circuit reversed summary judgment by the same district judge involved in the instant *Takeall* case because inferences favoring the non-moving party were not drawn from the record by Judge Smalkin in granting summary judgment against the plaintiff.

The conflict between *Anderson* and the instant case could not be more complete. In the instant case, both the district court and Fourth Circuit usurped the role of a jury by weighing the petitioner's evidence rather than limiting their inquiry to whether there existed a genuine issue of material fact. Petitioner contends that the district court not only failed to apply the appropriate standard of proof, but also failed to honor the axiom of Rule 56 of the Federal Rules of Civil Procedure that the non-moving party, must be afforded all inferences from the circumstantial evidence and proofs in deciding if there is a genuine issue of material fact in dispute.

The district court has here held that summary judgment was appropriate because Takeall, insofar as he was unable to produce direct evidence of access, could not convince a reasonable trier of fact that the creators of Pepsi's jingle had either direct or

indirect access to Petitioner's jingle or act. Despite Petitioner's own credible testimony, exhibits and numerous witnesses who testified that Petitioner used his slogan publicly before the inception of Pepsi's diet cola campaign, the district court, in both tone and substance discounted Petitioner's accomplishments as a professional entertainer and the dissemination of his slogan, "You Got The Right One, Uh-Huh". Labeling Petitioner's audiences as "limited", the district court weighed Petitioner's evidence of performances and found that they were confined to Job Corp centers and anti-drug programs for youth and therefore, unlikely to have been viewed by the alleged creators of Pepsi's slogan. Likewise, in its majority opinion, the court of appeals stated, that the "earliest videotape of Takeall using the phrase was in December 1991", implying that Petitioner manufactured his suit against PepsiCo after the company launched its multi-million dollar advertising campaign. (App. 3)

The district court nullified Petitioner's evidence that he submitted to PepsiCo and Pepsi-affiliated companies several proposals for corporate sponsorship of his "Say No To Drugs" tour by concluding that the evidence was insufficient to show access. Moreover, in considering Petitioner's evidence of submission, the district court stated its concern that petitioner's claims as to one of his submissions was not credible in light of expert testimony presented by the respondent, PepsiCo. Finally, the district court discredited the unrebutted testimony of Petitioner's advertising and entertainment expert witness, Dr. Eugene Sucunda. According to the district court, the testimony of Petitioner's expert witness that Takeall's jingle could have "percolated up" through Pepsi, without reference to specific facts or analyzed data, was simply conjecture and therefore, not competent to ward off summary judgment. The district court acknowledged that it had analyzed petitioner's evidence, observing that "the line between speculation and conjecture, on the one hand, and circumstantial evidence sufficient to support a verdict on the other, can be excruciatingly fine." (App. 24)

Nevertheless, the court concluded "[T]here is no more than a suspicion that appellee copied appellant's works, which is insufficient to warrant trial." (App. 25).

The consideration given Petitioner Takeall's evidence by the district court was aptly described by the Fourth Circuit when it noted, "the district court was not willing to place Takeall's pure speculation as to access before the deposition testimony establishing that no Pepsi Baltimore employee knew of or forwarded Takeall's correspondence." (App. 12).

Applying the same standard articulated by the district court, the court of appeals, found that:

> At bottom, the district court had before it unsupported claims that "millions" of listeners heard Takeall's performances "on a daily basis." Moreover, there was no evidence before the judge to show that Takeall at any time used the disputed phrase during these performances.

(App. 10).

With regard to Petitioner's evidence of submission of his slogan to Pepsi Baltimore and Pepsi affiliates, the court of appeals stated that it would not disturb the lower court's finding that Petitioner had failed to produce sufficient evidence of access, and that such decision was appropriate because the record did not reflect any evidence before the district court establishing access or copying by Pepsi's agents.

In a sharply worded dissent, Judge Neimeyer opined that Petitioner, in fact, had produced circumstantial evidence from which a reasonable possibility of access could be inferred, and that summary judgment, given the circumstances of this case, was inappropriate. (App. 14-16).

The record clearly shows evidence that Takeall began using his jingle several years before the Pepsi advertisements began. For instance, in March 1968, Takeall described his

ventriloquist partner Scooter in a letter from West Germany: "We're the right one, Uh-Huh", and the 1984 New Orleans World's Fair Press Release has graphic use of the Takeall jingle. Also unstated by the majority opinion is that appellant produced an audio tape taken from a 1984 Louisiana radio station broadcast by Takeall that uses the "Uh-Huh" jingle. Unstated too are the scores of witnesses who heard Takeall use the "Uh-Huh" slogan as a central part of his ventriloquist act for ten or more years before PepsiCo commenced advertising use of the jingle in January 1991. Takeall even used the jingle in appearances with Colonel Harlen Sanders of Kentucky Fried Chicken in 1977, as part of radio promotions in Las Vegas.

Further, the district court completely ignored Takeall's evidence of radio performances. According to the panel majority, Takeall's appearance "in 1970 and 1972 on two New York City area stations" at the time when the alleged creators of the Pepsi jingle were residing in same area, cannot support an inference of access through dissemination. (App. 9). In fact, Takeall used his "Uh-Huh" jingle at a Trenton radio station exactly when the lead creator of the Pepsi jingle, Peter Cofield, was attending college in Trenton. Mr. Takeall also made several Job Corps appearances each year in the New York City metropolitan area, precisely where PepsiCo alleges it created its jingle, performing before thousands of 18-25 year olds between the years 1984 and 1992. Moreover, Takeall's 25-year career as an entertainer regularly exposed him to the public, including (i) local and national television, (ii) radio broadcasting in 12 states, (iii) live night club performances in 48 states, (iv) charity telethons and dinners and (v) before thousands of young adults on school and Job Corp center campuses.

Throughout the district court opinion, as well as the decision of the majority panel, PepsiCo's defenses and witnesses are fully credited. Conversely, Petitioner's evidence was either ignored or deemed incredible. According to the district court,

Petitioner's evidence could be found to show a reasonable possibility of access, only if "all the deposition testimony from those with personal knowledge of facts of what happened to Mr. Takeall's alleged submissions" was disbelieved. (App. 23) The summary judgment authority of *Anderson et al v. Liberty Lobby, Inc.*, does not support such a conclusion, particularly when a reasonable person could give credence to one or more of petitioner's access theories. As noted above, Petitioner produced substantial evidence, *inter alia*, that he performed his ventriloquist act using the slogan for 25 years before the inception of the PepsiCo campaign, that he submitted sponsorship proposals to PepsiCo companies on three occasions and included in those proposals reference to his slogan and finally, that Petitioner made a Notary-certified submission of written and videotape versions in June 1989, directly in response to a PepsiCo solicitation in Black Enterprise magazine. Had the court given due consideration to petitioner's evidence, it could have determined, even if the testimony of only *one* of PepsiCo's witnesses was not accepted as credible, that Petitioner proved by a preponderance of the evidence the essential elements of his claim, and should have been permitted to present his case to a jury. Failure to do so deprived Takeall of his constitutional right to a trial by jury guaranteed to him by the Seventh Amendment.

CONCLUSION

This case presents two issues important to this Court. The first issue — that of appropriate burden of proof required to prove "access" when the plaintiff in a copyright infringement case has shown a striking similarity between the copyrighted work and the allege-infringing work — will resolve an emerging split between the federal circuit courts and will provide for a uniform application of the federal copyright law. The second issue — that of properly restricting a trial courts' use of Rule 56 so as to protect a party's constitutional right to a jury trial — is one which will become increasingly important as judges seek to

find ways to deal with the ever-increasing volume of cases they must decide.

The issues involved are worthy of this Court's attention. For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ARTHUR TAKEALL,

Petitioner,

v.

PEPSICO, INC.,

Respondent.

I, James L. Coffin, a member of the Bar of this Court, hereby certify that on this 5th day of May, 1994, three copies of the Petition for Writ of Certiorari in the above-captioned case were mailed, first class postage prepaid, to Charles D. Ossola, Esq., Hunton & Williams, 2000 Pennsylvania Avenue, N.W., Suite 9000, Washington, D.C. 20006, counsel for respondent. I further certify that all parties required to be served have been served.

James L. Coffin, Esquire

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UNPUBLISHED
No. 93-1237

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ARTHUR TAKEALL,
Plaintiff-Appellant,

v.

PEPSICO, INC.,
Defendant-Appellee.

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Frederic N. Smalkin, District Judge.
(CA-92-766-S)

Argued: September 29, 1993

Decided: December 8, 1993

Before RUSSELL and NIEMEYER, Circuit Judges, and MERHIGE, Senior United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed by unpublished per curiam opinion. Judge Niemeyer wrote a dissenting opinion.

COUNSEL

ARGUED: John Simon Lopatto, III, PAULSON, NACE & NORWIND, Washington, D.C., for Appellant. Charles Daniel Ossola, HUNTON & WILLIAMS, Washington, D.C., for Appellee. **ON BRIEF:** Claude W. Rosborough, ROSBOROUGH & TILLERSON. Washington, D.C., for Appellant. Sharon G.

Hyman, Stephen P. Demm, HUNTON & WILLIAMS, Washington, D.C., for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6

OPINION

PER CURIAM:

This matter comes before the Court on appellant/plaintiff Takeall's appeal from the district court's order granting summary judgment in favor of defendant Pepsico on December 23, 1992. Takeall filed suit against Pepsico seeking damages for copyright infringement, "reverse confusion and passing off," breach of contract, unjust enrichment, and unfair competition. In the instant appeal, Takeall challenges as an abuse of discretion the district court's order regarding his copyright infringement claim and his state claims. Orders granting summary judgment are reviewed *de novo*, *M&M Medical Supplies & Service, Inc. v. Pleasant Valley Hospital, Inc.*, 981 F.2d 160, 163 (4th Cir.1993) and the standard of review is abuse of discretion. All findings of fact are reviewed under the clearly erroneous rule. *Pizzeria Uno Corp. v. Temple*, 747 F.2d 1522, 1526 (4th Cir. 1984).

This case involves a dispute over conflicting claims to the phrase "You Got The Right One, Uh-Huh."

Appellant Takeall is an entertainer who performs a ventriloquist act with a dummy named "Scooter." Beginning in approximately 1970 and continuing until 1977, Takeall and "Scooter" made radio appearances on 25 radio stations in 12 states. In 1977, Takeall made the transition from radio disc jockey to stand-up performer, and from 1977 to 1983 he appeared as an entertainer in nightclubs and hotels in Las Vegas, Nevada.

In 1984, Takeall took his act to the New Orleans World's Fair. His arrival was preceded by a press release from the Fair stating that the audience would know they were in the correct pavilion when they heard the ventriloquist duo say "You Got the Right One, Uh-Huh."

Following the World's Fair, Takeall began working for the Department of Labor's Job Corp program serving the needs of underprivileged minority youth. Since 1984, Takeall has performed nearly exclusively at Job Corps centers across the country, where he has used his ventriloquism skills to convey an anti-drug message. With the exception of one performance on the Christian Broadcast Network's 700 Club, Takeall's performances beyond the Job Corps centers have been confined to schools, mostly at the elementary level.

Takeall's use of the term "Uh-Huh" as a part of his act began in the 1960's. Takeall testified in deposition that the phrase "You Got the Right One, Uh-Huh" became "official" as a part of his act in 1984. The earliest videotape of Takeall using the phrase was in December 1991.

On January 29, 1992, Takeall applied for a copyright registration, claiming a copyright in the "words and narration" of his act. Takeall stated on his application that his ventriloquist act was created in 1984.

In January 1991 Pepsico began airing Diet Pepsi commercials featuring a well-known entertainer, Ray Charles, singing "You Got the Right One, Baby, Uh-Huh." The advertisements followed a predecessor advertising campaign using the phrase "The Right One" as a "tag line" at the end of the commercials. The phrase "The Right One" was first proposed for consideration in a Diet Pepsi advertizing campaign in late 1988. The first television commercial featuring the phrase "The Right One" appeared on the air on July 4, 1989.

Pepsico's advertising agency experimented with different refrains for Ray Charles to use in "The Right One" commercial, including " Yeah, Yeah" and "Uh-Huh."

Takeall alleges three contacts with Pepsico in support of his contention that Pepsico had access to the phrase in which he claims copyright. First, Takeall alleges that he travelled to Albany, Georgia to deliver to Mr. Brady Keys a proposal requesting corporate sponsorship for a proposed "Say No to Drugs" tour. Mr. Keys is a franchisee of KFC Corporation, a wholly owned subsidiary of Pepsico. Takeall had no appointment with Keys, and in fact never met with Keys. Rather, Takeall delivered the "promotional package" to an unidentified person in Keys' office. The only document in the package containing the phrase at issue was the New Orleans World's Fair press release. Keys has denied ever receiving Takeall's alleged submission. Keys has further stated that he never forwarded the package or communicated its contents to Pepsico or its advertising agency.

Second, Takeall alleges he sent a similar proposal for corporate sponsorship in early 1989 to Barry Johnson, former Director of Affirmative Action at Pizza Hut. Pizza Hut is also a wholly owned subsidiary of Pepsico. None of the materials in the package to Johnson contained the phrase "You Got the Right One, Uh-Huh." Johnson has stated that he has no recollection of ever receiving the materials from Takeall and believes that he did not forward to anyone at Pepsico or its advertising agency any correspondence from Takeall.

Finally, Takeall alleges that he mailed a promotional package and sponsorship proposal to Pepsi Baltimore on June 27, 1989. This mailing, Takeall asserts, was in response to a Pepsi advertisement in *Black Enterprise* magazine seeking applicants for Pepsi's Minority Business Enterprise Program.

Two of the letters contained in the package mailed to Pepsi Baltimore contained reference to the phrase in dispute. Pepsico has challenged the authenticity of one of the letters containing the phrase. The advertisement requested that proposal be mailed to a specific Pepsi official. Takeall mailed his proposal to the marketing director at Pepsi Baltimore rather than to the individual identified in the advertisement. Pepsi has no record of having received Takeall's proposal.

On March 17, 1993, Takeall filed suit against Pepsico seeking damages for copyright infringement, "reverse confusion and passing off," as well as other state claims. In granting summary judgment in favor of defendant, the district court assumed the phrase's copyrightability and ruled on the basis of Takeall's failure to meet his threshold burden of showing "reasonable possibility of access" by Pepsico to the property Takeall claims.

Summary judgment is properly granted to the moving party when the court determines that "no reasonable jury could find for the non-moving party on the evidence before it." *Perini Corp. v. Perini Construction, Inc.*, 915 F.2d 121, 124 (4th cir. 1990), *citing, Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Any inferences from the underlying facts must be drawn in favor of the party opposing the motion, and when such inferences reveal a genuine dispute over a material fact summary judgment must be denied. *Tuck v. Henkel Corp.*, 973 F.2d 371 (4th Cir. 1992) A moving party is entitled to summary judgment where the non-moving party has failed to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

Takeall first argues in this appeal that the district court held him to an improper standard in concluding that Takeall has not

demonstrated a triable issue of fact as to the possibility of access by Pepsico to his work.

To establish copyright infringement, two elements must be proven: "(1)ownership of a valid copyright, and (2) copying of constituent elements of the work that are original." *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 111 S. Ct. 1282, 1296 (1991). In addition, this Circuit has recognized that proof of copying can be established in one of two ways: direct evidence of copying by the defendant, or circumstantial evidence sufficient to create a presumption of copying. *Keeler Brass Co., v. Continental Brass Co.*, 862 F.2d 1063, 1065 (4th Cir. 1988).

As a general matter, a plaintiff seeking to show copying through circumstantial evidence must establish a prima facie case with respect to two elements of his claim. First, a plaintiff must prove access to his work, or an opportunity to copy, by the alleged copier, and second, he must prove sufficient similarity between the two works to indicate that copying has in fact occurred. *Id.* at 1066.

Conceding that his is not a case of direct evidence, Takeall asserts that he established sufficient circumstantial evidence to create a triable issue on the question of access. Takeall argues that, as a matter of law, the greater the similarity between the disputed works, the less is the burden to show access. If a "striking similarity" between the two works is shown, Takeall contends, his burden of showing access is minimal, and copying can be inferred. *Evans v. Wallace Berrie & Co., Inc.*, 681 F. Supp. 813 (S.D. Fla. 1988). Takeall claims that although the district court assumed striking similarity, it incorrectly demanded greater proof of access than was required. Had the court considered Takeall's evidence in light of the lesser standard of proof in "striking similarity" cases, so Takeall

contends, it could not have awarded summary judgment in favor of Pepsico.

Takeall relies virtually exclusively on *Gaste v. Kaiserman*, 863 F.2d 1061 (2d Cir. 1988) in support of his argument that he is entitled to a lesser showing of access because of "striking similarity." In *Gaste*, the Second Circuit upheld a jury determination that defendants, composer and publisher of the well-known song "Feelings," had infringed the copyright in an earlier song of a different title. On appeal defendants argued that the district court's instruction to the jury on striking similarity was a misstatement of the law. The court instructed the jury that "access..[did] not have to be proven" if the plaintiff's work and the allegedly infringing work were "strikingly similar." *Id.* at 1063. The Court of Appeals upheld the lower court's instruction as a correct statement of the law.

Takeall argues that his case fits squarely within the "striking similarity" context. As such, he argues that the district court erred in requiring proof of a reasonable possibility of access.

Pepsico argues that, to the extent "striking similarity"is a viable doctrine, its application to this case is inappropriate. Pepsico asserts that, as applied by the courts, "striking similarity" is reserved for similarities of such breadth or of such an extraordinary nature that no explanation other than copying is plausible. *See Selle v. Gibb*, 741 F.2d 896. 901 (7th Cir. 1984); *Ferguson v. National Broadcasting Co., Inc.*, 584 F.2d 111, 113 (5th Cir. 1978). Pepsico argues that while there may be a situation in which striking similarity would dispense with the need for further proof of access, courts are dubious that such a circumstances could ever arise.

> [S]triking similarity is just one piece of circumstantial evidence tending to show access and must not be

> considered in isolation; it must be considered together with other types of circumstantial evidence relating to access ...Thus, although it has frequently been written that striking similarity *alone* can establish access, the decided cases suggest that this circumstance would be most unusual.

Selle at 901 (emphasis in original).

Further, Pepsico argues that *Gaste* cannot support Takeall's claim of relief from proving a reasonable possibility of access. Pepsico asserts that the Second Circuit in *Gaste* did not hold that a showing of striking similarity alone automatically precludes any further requirement that the plaintiff show a reasonable possibility of access. Also, Pepsico notes that the evidence before the district court in *Gaste* was in fact sufficient to demonstrate a reasonable possibility of access.

Finally, even though the district court in this case was willing to assume striking similarity, Pepsico argues that there is not striking similarity between the two works as a matter of law. Pepsico contends that the strikingly similar standard requires that works be virtually identical. *Evans v. Wallace Berrie & Co., Inc.*, 681 F. Supp. 813, 818 (S.D. Fla. 1988). The similarities Takeall's ventriloquist act and Pepsi's television commercials, Pepsico argues, do not by any reasonable standard rise to this level.

The district court found that Takeall had submitted sufficient evidence from which a reasonable finder of fact could conceivably find striking similarity. Nonetheless, the court concluded that such evidence alone is not enough; rather, there must be some other circumstantial evidence establishing a reasonable possibility of access. *Selle* at 901. In effect, Takeall invites this Court to adopt a *per se* rule regarding the elimination of the need for proof of access in cases involving "striking

similarity". Even assuming, as did the district court, that this is a case of striking similarity, in our view, such a *per se* rule is inadvisable and unsupported by law. The Second Circuit in *Gaste* recognized the limitations of the inference raised by striking similarity.

> Though striking similarity alone can raise an inference of copying, that inference must be reasonable in light of all the evidence. A plaintiff has not proved striking similarity sufficient to sustain a finding of copying if the evidence as a whole does not preclude any reasonable possibility of independent creation.

Gaste at 1068.

Here, even under the reduced standard in *Gaste*, we conclude that the district court did not abuse its discretion in requiring of Takeall a showing of reasonable possibility of access despite the assumption of striking similarity.

Takeall contends that his public appearances since 1968 raise a triable issue as to a determination of access to his work through wide dissemination. In support of this contention, Takeall points to his appearance on 26 radio stations between 1970 and 1984. Takeall also argues that his appearances in 1970 and 1972 on two New York City area stations while creators of the Pepsi jingle were living in the New York area suggest wide dissemination and access.

Pepsico correctly argues that, while there may be authority to support a finding of access through wide dissemination of a plaintiff's work, the cases that have found dissemination wide enough to infer access have done so on the basis of a far stronger record. Pepsico asserts that the district court's finding that Takeall's work was not disseminated to such an extent that access by Pepsi's advertising professionals could be presumed should not be disturbed. Pepsico adds that the mere presence of

the creators of the Diet Pepsi commercials in the New York area some twenty years prior to the Ray Charles commercial but approximately coincident with two performances there by Takeall cannot reasonably support an inference of access through dissemination.

Courts have found that wide dissemination can be the basis for an inference of access. *See e.g. ABKCO Music, Inc. v. Harrisongs Music, Ltd.*, 722 F.2d 988 (2d Cir. 1983) ("He's So Fine" was the number one best seller in America for five weeks, and was one of the "Top Thirty" songs in England for seven weeks); *Cholvin v. B. & F. Music Co.*, 253 F.2d 102 (7th cir. 1958) (plaintiff's work sold over 2,000 copies of sheet music, 200,000 records, and was broadcast nationally on several occasions).

The district court based its determination that there was insufficient evidence to support an inference of access through dissemination on its finding that Takeall's performances were principally confided to Job Centers and schools. The Court found that there was "absolutely no evidence" that the creators of the Diet Pepsi commercials had any access to these or other performances.

We hold that the district court's finding of insufficient evidence to show dissemination was not clearly erroneous and must be sustained. At bottom, the district court had before it unsupported claims that "millions" of listeners heard Takeall's performances "on a daily basis". Moreover, there was no evidence before the district judge to show that Takeall at any time used the disputed phrase during these performances. Notwithstanding the fact that evidence of the whereabouts of the creators of the Diet Pepsi commercials was not before the district court, their presence alone is not enough for a fact finder to infer access. *See Intersong-USA v. CBS, Inc.*, 757 F. Supp. 274

(S.D.N.Y. 1991) (radio broadcast of plaintiff's song in New York or Miami while composers of allegedly infringing song were there held insufficient to infer that they heard the song).

Takeall further argues that his contracts with Pepsico subsidiaries and, in particular, with Pepsi Baltimore created a triable issue on the question of access. Takeall asserts that in responding to Pepsi's solicitation to the minority community in a June 1989 *Black Enterprise* magazine advertisement, he sent Pepsi a package containing video tapes of his act and two handwritten letters containing the phrase "You Got The Right One, Uh-Huh." Relying upon the presumption under Maryland law that a letter mailed is deemed received, he contends that the receipt of his submission by Pepsi employees in Baltimore was in itself enough evidence of access to create a genuine factual issue. *McFerren v. Gold-Smith Stern Co.*, 113 A. 107, 109, 137 Md. 575 (1921).

Pepsico correctly notes that, regardless of the paucity of evidence showing Pepsi actually received Takeall's package, Takeall's contention that a letter mailed is deemed received is an incorrect statement of the law. Under the "corporate receipt doctrine," Pepsico points out that it is necessary to show "physical propinquity" between the receiving employee and other employees whereby "the latter has the opportunity to view the work in the possession of the former." 3 M. Nimmer & D. Nimmer, *Nimmer on Copyright* § 13.02[A], p. 13-17

Pepsi asserts that the alleged copiers are not employees of Pepsi, but rather outside advertising professionals. As such, a plaintiff can establish the possibility of access only "where there is a relationship linking the intermediary [here an employee of Pepsi Baltimore] and the alleged copier." *Moore v. Columbia Pictures Indus., Inc.*, 972 F.2d 939, 942 (8th Cir. 1992), *quoting Meta-Film Assoc., Inc. v. MCA, Inc.*, 586 F. Supp. 1346, 1357

(C.D. Cal. 1984). In *Meta-Film*, the courts established that the "key feature" of proof of access through an intermediary is a "close relationship linking the intermediary and the alleged copier." *Meta-Film* at 1357. Pepsico argues that in this case the record shows no evidence of any relationship between Pepsi Baltimore and the creators of the Diet Pepsi commercials. Thus, even if the receipt by employees of Pepsi Baltimore of Takeall's proposal were presumed, it would not be enough to establish a reasonable possibility of access to Takeall's work by the alleged copiers.

The district court found that Takeall's three alleged proposals to Pepsi subsidiaries and Pepsi Baltimore were insufficient evidence of a reasonable possibility of access to his work by the creators of the Diet Pepsi commercials-a finding that we will not disturb. The record reflects no evidence before the trial court establishing access on the part of the alleged copiers. Further, the district court was not willing to place Takeall's pure speculation as to access before the deposition testimony establishing that no Pepsi Baltimore employee knew of or forwarded Takeall's correspondence.

Takeall argues that the district court improperly discounted the testimony of Dr. Eugene Secunda. Dr. Secunda testified that Takeall's conduct in responding to the June 1989 Pepsi advertisement was reasonable and foreseeable by Pepsi. Dr. Secunda also stated that, given the tendency in the advertising profession of ideas to "percolate up" to the creative personnel, Mr. Takeall's submission to Pepsi Baltimore provided Pepsico with access to Takeall's material.

Takeall maintains that, once a witness has been qualified as an expert, the court cannot regulate the factors the expert uses or the mental processes by which the expert arrives at conclusions. These matters, according to Takeall, can be

challenged only by cross examination, *Girson v. United States*, 88 F.2d 358 (9th Cir. 1937). In addition, he asserts that the experts testimony was admissible under Federal Rule of Evidence 702.

We hold that the district court was not obliged to afford Takeall the opportunity to present Secunda's theory concerning access to a jury, in light of its lack of any factual basis. Pepsico correctly notes that Takeall, as the party opposing the motion, bore the burden of producing competent evidence of a genuine, triable issue of material fact on the question of access. *See Celotex* at 322-23. Pepsico correctly points out that Secunda admitted that "I have no facts to substantiate that," referring to the percolation up theory. Further, Pepsico argues that Secunda acknowledged that "I don't know what the particular kind of relationships existed between the creative people at [Pepsi's advertising agency] and the marketing department at Pepsi."

We find that the district court properly concluded that Secunda's testimony could not raise a material fact with respect to access.

The district court reasonably discounted Takeall's expert testimony on the "percolation up" theory, noting that Dr. Secunda's testimony rested "not on any expert analysis of data, any specific fact, or any particular experience, but simply on his own conjecture." Such an unsupported theory would not have been of any help in deciding the issue. "[An] affidavit lacking facts does not satisfy the requirements of Fed.R.Civ. P. 56(e)." *M & M Medical Supplies and Service, Inc. v. Pleasant Valley Hospital, Inc.*, 981 F.2d, 160, 166 (4th Cir. 1993). Here, the district court found that the expert's deposition lacked facts and was not sufficient to satisfy Rule 56 requirements.

Takeall claims that his alleged submission of his "protected work" to Pepsi constituted the extra element necessary to avoid

pre-emption. He further contends that the evidence of his mailing of a proposal to Pepsi Baltimore created an implied-in-fact contract.

Pepsico, with whom we agree as to this, argues that this claim represents a clear case for pre-emption. Here, Pepsico asserts, the rights sought to be vindicated are equivalent to any right encompassed by copyright. Accordingly, federal pre-emption of state claims is mandatory. 17 U.S.C. § 301. *See Kakizaki v. Riedel*, 811 F. Supp. 129, 133(S.D.N.Y. 1992). Also, Takeall failed to established an evidentiary basis for his state claims regarding any of the elements required by Maryland law for an implied-in-fact contract.

The district court's ruling against Takeall on his state claims was premised on the same finding of insufficient evidence that resulted in the court's disposition of his copyright claims. Concluding that Takeall's state law claims were unsupported by the record, we find no error in such a conclusion. Further, there is not evidence to suggest that the conduct of the parties manifested mutual assent necessary for an implied-in-fact contract. As with Takeall's copyright claims, it cannot be said that the district court erred in its finding of insufficient evidence.

Finally, Pepsico argues that, if this Court were to conclude, as we do not, that summary judgement on access grounds was improperly granted, it should proceed to resolve the question whether the phrase is protectable rather that remand the issue to the district court. Pepsico contends that material sought to be protected must be independently created and must possess "at least some minimal degree of creativity." *Feist* at 1287. In addition, even if a work as a whole is copyrightable, copyright protection does not extend to its component parts that are not. *See Apple Computer, Inc. v. Microsoft Corp.*, 799 F. Supp. 1006,

1020 (N.D. Cal. 1992). We are of the view that the disputed phrase fails to evince the requisite degree of originality to entitle it to copyright protection and is a short expression of the sort that courts have uniformly held uncopyrightable. *See Narrell v. Freeman*, 872 F.2d 907, 911 (9th Cir. 1989); *Alberto-Cluver Co. v. Andrea Dumon, Inc.*, 466 F.2d 705, 711 (7th Cir. 1971). *See also* 37 C.F.R. 202.1(a) (1992)("short phrases such as names, title and slogans" are not subject to copyright). Finding no error in the trail court's holdings, we affirm.

AFFIRMED

NIEMEYER, Circuit Judge, dissenting:

Plaintiff's case is a thinly supported one and in the end may not be sustainable. But, on the record before us now, it cannot, I believe, be disposed of as a matter of law.

Arthur Takeall was concededly the first to use the phrase at issue, "You've got the right one, Uh-Huh," and he used it with the same voice inflections that are used in the allegedly infringing Pepsi commercial. Moreover, he used it very publicly on the radio and on television. It is noteworthy that as early as 1984 his act at the New Orleans Worlds Fair was promoted in circulars identifying Takeall with the, "You've got the right one, uh-huh."

Whether Pepsico copied Takeall's phrase when it used the identical phrase in its well-known Pepsi commercials featuring Ray Charles is a closer question. Takeall was able to present no evidence that Pepsico did copy Takeall's phrase. But he did present circumstantial evidence from which Pepsico's access to the phrase can be inferred and that evidence cannot be ignored in the context of a summary judgment motion. For example, Takeall presented evidence that his use of the phrase was

publicized through radio and television over a number of years. It was also publicized in a large number of live performances in various other contexts. From this evidence, a factfinder might properly conclude that a large audience, comprising perhaps millions, became familiar with his self-identifying phrase.

In addition to the general publicity. Takeall also presented evidence that he sent the phrase directly to Pepsico in Baltimore for consideration in its promotions, in response to Pepsi's own minority business solicitation campaign. He also sent the phrase to two of Pepsico's subsidiaries. While the receipt of the letters and use of them by Pepsico are disputed vigorously by Pepsico, the denial does not eviscerate the evidence presented by Takeall.

Finally, Takeall presented evidence from an expert witness knowledgeable about the advertising industry who explained how ideas in organizations "percolate up" to reach creative personnel, particularly when corporations are involved in advertising.

When reviewing the record on a motion for summary judgment, we are obliged to afford the plaintiff the full benefit of all inferences that may fairly by drawn from the circumstantial evidence, and the reach of these inferences is in this case, I submit, a factual question for the trier of fact.

While the majority points to testimony of witnesses on behalf of Takeall who had to acknowledge that they had no direct knowledge that Pepsico know of or copied Takeall's phrase, that observation fails to take into account the inferences that may by drawn from the other evidence Takeall presented. The majority dismisses the circumstantial evidence and inferences to be drawn from it as "pure speculation." Nonetheless, placing the line between where reasonable inferences from circumstantial evidence end and where speculation begins is a function for the factfinder.

Finally, I cannot fail to observe that the majority's very discussion in reviewing the district court's opinion betrays the improper role undertaken by the district court and ours. On page 9 of the majority opinion, it is stated, "We hold that the district court's finding of insufficient evidence to show dissemination was not clearly erroneous and must be sustained."

While Takeall's burden of proof to show that Pepsico copied his phrase may prove to be insurmountable in the end, in my judgment, he presented enough at this stage of the proceedings to create a factual issue. I would reverse the judgment of the district court and, therefore, I respectfully dissent.

No. 93-1237
CA-92-766-S

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ARTHUR TAKEALL

Plaintiff-Appellant

v.

PEPSICO, INC.

Defendant-Appellee

FILED

January 5, 1994

On Petition for Rehearing with Suggestion for Rehearing In Banc

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

For the Court,

/s/Bert M. Montague
CLERK

Civil No. S 92-766

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND

ARTHUR TAKEALL

v.

PEPSICO, INC.

John S. Lopatto, III, Paulson, Nace, Norwind & Sellinger, of Washington, D.C., for plaintiff.

Charles D. Ossola, Sharon G. Hyman, and Stephen P. Demm, Hunton & Williams, Washington, D.C., for defendant.

Filed: December 23, 1992

SMALKIN, U.S.D.J.:

MEMORANDUM OPINION

This is a case arising from a high-profile advertising campaign for Diet Pepsi, sprung on the American populace during the 1991 Superbowl after its curiosity had been worked up into an anticipatory frenzy by pre-Superbowl "teaser" advertisements. During the Superbowl, and at what must have been phenomenal per-spot fees, PepsiCo had the legendary Ray Charles premiere its new Diet Pepsi jingle, by playing and singing, among other lines, "You got the right one, Baby, uh-huh!" Authorship of this pedestrian, but catchy, slogan is claimed by the plaintiff, Arthur Takeall, a relatively obscure (compared to both Pepsi and Ray Charles) Maryland ventriloquist. PepsiCo claims that, even if Mr. Takeall came up with the language in question before it did, PepsiCo did not

violate Mr. Takeall's rights by using it in advertising Diet Pepsi. The case is before the Court on the defendant's summary judgment motion, which the plaintiff has opposed.

Of course, the standards for summary judgment are well-settled. Under Rule 56(c), the opponent of the motion must produce evidence on which a reasonable fact-finder, under the appropriate proof burden, could base a verdict for the opponent. If the opponent cannot produce such evidence, the motion must be granted. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

The defendant makes a number of arguments in support of its motion, which was supported by a voluminous memorandum and a mountain of exhibits. The plaintiff has submitted an equally impressive opposition to the defendant's motion. In light of these massive written submissions, no oral hearing is necessary. Local Rule 105.6, D.Md.

First, the Court will address an inconsequential argument raised by the defendant. The defendant contends that plaintiff's reconstruction of his claimed early works incorporating the contested language is inadmissible under the best evidence rule, Fed. R. Evid. 1001 *et seq.*, *citing Seiler v. Lucasfilm, Ltd.*, 808 F.2d 1316 (9th Cir. 1986), *cert. denied*, 484 U.S. 826 (1987). The problem with applying that case here is that the trial court in *Lucasfilm* found that the plaintiff had destroyed the originals in bad faith. 808 F.2d at 1318. Here, there simply is no such claim, nor is there any factual support for one. Although the defendant is skeptical about plaintiff's claim that the originals were lost in an airline baggage snafu, there is no evidence that they were destroyed in bad faith. Thus, there is no insuperable bar to admission of secondary evidence of the works.

The next issue to be discussed is whether the phrase at issue is copyrightable at all. There is sound authority for the proposition that simple and/or commonplace expressions lack sufficient originality to be copyrightable, *see, e.g., Narrell v.*

Freeman, 872 F.2d 907 (9th Cir. 1989), but this determination is one of degree. In the instant case, the Court is not prepared to hold, on summary judgment, that the phrase at issue so lacks originality as to be unworthy of copyright protection. The expression is not commonly heard, to this Court's knowledge, among either cultured or uncultured speakers of the American Dialect of the English language, and the creators of Pepsi's jingle, as reflected in PepsiCo's motion papers filed in this case, claim to have derived it as an act of artistic creativity, if not inspiration. Thus, for the purposes of the present discussion, the Court will assume that the Takeall phrase is copyrightable.

Protectability under copyright laws having been assumed, the next question is whether there is a triable dispute of fact on the issue of access by the defendant to the Takeall work. Under *Celotex* and *Anderson*, both *supra*, given the exhibits supporting defendant's claims of non-access, Mr. Takeall bears the burden of coming forth with enough evidence of access to warrant a reasonable fact-finder in deciding the issue in his favor, by a preponderance of the evidence, keeping in mind that inferences are to be taken in his favor.

It is well-settled that the plaintiff in a case such as this must show, by a preponderance, that the alleged copier had access to his works. *Atari, Inc. v. Amusement World. Inc.*, 547 F. Supp. 222, 227 (D. Md. 1981). What must be shown is more than a bare possibility of access (which would amount to no more than conjecture), but a "reasonable possibility of access." *Moore v. Columbia Pictures Indus., Inc.*, 972 F.2d 939, 944 (8th Cir. 1992); *Gaste v. Kaiserman*, 863 F.2d 1061, 1066 (2d Cir. 1988). In this case, especially given the huge scope of Pepsi's operations, the question is whether the composers of the Pepsi jingle had the reasonable possibility of access. The composers of the Pepsi jingle have both testified on deposition that they never heard of Takeall, his dummy, his act, or his jingle (nor did they see his proposal to Pepsi, Pizza Hut, and/or KFC) before

creating the Pepsi jingle. Of course, the fact that the composers have denied access does not alone entitle PepsiCo to summary judgment, if Takeall can come up with evidence that amounts to more than a conjecture or speculation to the contrary. *See, e.g., Ferguson v. National Broadcasting Co.*, 584 F.2d 111, 113 (5th Cir. 1978).

The evidence that Takeall puts forward is of two sorts. First, he has submitted documentation that his act, including the jingle in question, was performed at various places since 1964. These performances, however, were mostly in connection with his crusade against drugs, and took place primarily in a limited market and before limited audiences, such as schools and Job Corps centers, to which there is absolutely no evidence that the alleged Pepsi creators had any access at all. The Court concludes, as a matter of law, that the plaintiff's works were not so widely disseminated as to support a reasonable fact-finder's conclusion, by a preponderance of the evidence, that defendant's creative people had access thereby. *See, e.g., Selle v. Gibbs*, 741 F.2d 896, 901 (7th Cir. 1984).

Another question is whether striking similarity of the works as performed can support a finding of access, as plaintiff contends. The plaintiff has submitted performance tapes and expert testimony from which a reasonable fact-finder could conceivably find striking similarity, taking the inferences most favorably toward the plaintiff, as the Court must do on summary judgment. In *Selle, supra*, however, the Court demonstrated convincingly that such evidence alone is not enough; rather, there must be some other circumstantial evidence establishing a reasonable possibility of access. 741 F.2d at 901. *See also Gaste, supra*, 863 F.2d at 1067-68.

The plaintiff claims that the evidence he needs to demonstrate a reasonable possibility of access comes from his submission of several proposals (to gain corporate sponsorship of his "Say No to Drugs" tour) to several Pepsi-affiliated

companies and activities from late 1988 to mid-1989. Although defendant does not claim that the alleged copiers of the slogan worked directly for Pepsi, there is some support for a theory of third-party access, where the work is submitted to some person or agency associated with the alleged copier. The Courts have, however, viewed such third-party claims with some skepticism. *See, e.g., Hofmann v. Pressman Toy Corp.*, 790 F. Supp. 498, 506-08 (D. N.J. 1990).

Specifically, plaintiff claims to have submitted one of these proposals to a KFC franchisee, one Brady Keys, in Albany, Georgia. (KFC is a Pepsi-affiliated company.) Takeall claims that one press release, among many items in the proposal package, referred to the phrase in question. Mr. Keys has testified on deposition that he has no recollection of the proposal — or of Mr. Takeall, for that matter — and that he did not forward it to Pepsi or otherwise notify Pepsi of its contents, if in fact he received it at all.

Of course, the plaintiff is entitled, at this stage, to have *his* evidence of delivery of the proposals credited, which the Court will do, but, beyond that, he is entitled to no presumption or assumption as to what happened to the materials after submission; that is something on which he must offer sufficient evidence under *Anderson* and *Celotex* to survive this motion, as will be discussed more fully below.

The second Pepsi-related submission was to a Mr. Barry Johnson, affirmative action director of Pepsi's Pizza Hut subsidiary. None of those materials had any direct reference to the phrase at issue. The alleged recipient, Mr. Johnson, has no recollection of it, and he has testified that, had he received such a submission, it would not have been forwarded on to Pepsi headquarters (or to its advertising agency, for that matter).

The third submission was to Pepsi's regional offices in Baltimore, in response to an advertisement in a minority business journal seeking suppliers of goods and services to

Pepsi. The Pepsi personnel who would have received the submission have no recollection of it, and their testimony is that it would not have been forwarded on beyond Baltimore. (The Court is concerned that the plaintiff's claims as to this particular submission might not be so worthy of belief as would ordinarily be the case under Rule 56, in light of a claim that the paper on which he said he copied the mailing was not even made until the next year, and that his own telephone records show that he himself placed his name on Pepsi's mailing list by calling an 800 number in 1991, although he testified that he never did so. For reasons that appear *post*, though, the Court need not become embroiled in this mini-dispute, nor need it at all discredit plaintiff's version of *his* activities in connection with the Baltimore submission in order to resolve this motion.)

The Court is of the opinion that the plaintiff has produced no evidence from which a reasonable fact-finder could find, by a preponderance of the evidence, that the creators of the Pepsi jingle had direct or indirect access to Takeall's phrase from the three submissions discussed above, even taking into account "striking similarity." A conclusion of access could not reasonably be based on inference or deduction from the evidence involving these submissions, as there is simply no *evidence* establishing access on the part of the alleged copiers; such a conclusion could be based only on speculation and conjecture, grounded on a total disbelief of all the deposition testimony from those with personal knowledge of the facts of what happened to Mr. Takeall's alleged submissions. All of these people have denied forwarding the material on beyond the local level, and a fact-finder would necessarily have to disbelieve their testimony in order to find access, as Mr. Takeall has produced no independent evidence that the proposals were ever forwarded.

It is well-settled that, on summary judgment, absent specific facts discrediting testimony from a witness associated with the defendant, and absent a direct *conflict* in the testimony,

the plaintiff (although entitled to have his *own* evidence taken as true) is not entitled to have the defendant's evidence positively disbelieved. *See* discussion and cases collected in 10A C. Wright, A. Miller, and M. Kane, *Federal Practice and Procedure: Civil 2d* §2726 at 119 nn.11 & 12 (1983). Thus, plaintiff's case must fail, because the crucial evidence of access needed to build his case beyond speculation and conjecture to a level of circumstance that would warrant a reasonable fact-finder in concluding that defendant stole his work is simply missing. The fact that the persons involved were affiliated with Pepsi (only one was a Pepsi employee, the others being independent franchise owners or employees) is not enough of a showing of "specific fact" to warrant disbelief. *Id.*; *see also Walpert v. Bart*, 280 F. Supp. 1006, 1013 (D. Md. 1967) (affidavits of defendant's directors not to be discredited as such), *aff'd per curiam*, 390 F.2d 877 (4th Cir. 1968).

The testimony of plaintiff's expert, Dr. Secunda, on the question of access, when carefully examined (*see, e.g.*, pltf.'s summary judgment ex. 41 at 166-73), shows that his conclusion that the jingle could have "percolated up" through Pepsi rests not on any expert analysis of data, any specific fact, or any particular experience, but simply on his own conjecture. Thus, it is not competent to ward off summary judgment. *See M&M Medical Supplies and Service, Incorporated v. Pleasant Valley Hospital, Incorporated*, ___ F.2d ___, No. 90-3100 (4th Cir. Dec. 9, 1992), slip op. at 7-9. Even so, his deposition makes it clear that it is trade practice *not* to incorporate such customer-originated suggestions in advertising campaigns, *id.* at 63-64, thus undermining whatever little probative value his conjecture on the point might otherwise have had.

Certainly there is, in the foregoing analysis, a question of some judgment. The line between speculation and conjecture, on the one hand, and circumstantial evidence sufficient to support a verdict on the other, can be exceedingly fine, but,

taking into account all the circumstances in this case there is no more than a suspicion that defendant copied plaintiff's works, which is insufficient to warrant trial. *See Ferguson v. National Broadcasting Co., supra.*

(There is unrebutted evidence that the Pepsi jingle was independently created before Takeall made his submissions to the Pepsi-related enterprises, *see Novak v. National Broadcasting Co.*, 752 F. Supp. 164, 170-71 (S.D.N.Y. 1990), *reh. denied*, 760 F. Supp. 47 (S.D.N.Y. 1991), but, given financial bias attributed by plaintiff in his opposition memorandum to those receiving royalties from Pepsi's campaign, there is enough of a showing of "specific facts" to warrant disbelief of that evidence on summary judgment.)

Next, PepsiCo argued that Takeall's state-law claims for breach of contract and unjust enrichment are pre-empted by the Copyright Act. Even if they were not, his failure to be able (as discussed above) to bring forth evidence of any express or implied contract in fact, or quasi-contract implied in law, with Pepsi would bar his recovery on those claims under familiar summary judgment principles discussed *ante*.

Finally, because no reasonable fact-finder could possibly find any likelihood of confusion between Pepsi's product and his ventriloquist act (even assuming trademark protection is properly pled for the latter), summary judgment is also warranted on the plaintiff's claims for "reverse confusion and passing off," as well as for unfair competition. *See, e.g., Bridges in Organizations, Inc. v. Bureau of National Affairs, Inc.*, 19 U.S.P.Q.2d 1827, 1831 32 (D. Md. 1991).

For the reasons stated, an order will be entered separately, granting the defendant's motion for summary judgment.

/s/
Frederic N. Smalkin
United States District Judge

PERTINENT CONSTITUTIONAL PROVISIONS

The Seventh Amendment to the United States Constitution provides as follows:

AMENDMENT VII [1791]

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

§ 501. Infringement of copyright

(a) Anyone who violates any of the exclusive rights of the copyright owner as provided by sections 106 § through 118, or of the author as provided in section 106A(a), or who imports copies or phonorecords into the United States in violation of section 602, is an infringer of the copyright or right of the author, as the case may be. For the purposes of this chapter (other than section 506), any reference to copyright shall be deemed to include the rights conferred by section 106A(a). As used in this subsection, the term "anyone" includes any State, any instrumentality of a State, and any office or employee of a State or instrumentality of a State acting in his or her official capacity. Any State, and any such instrumentality, office, or employee, shall be subject to the provisions of this title in the same manner and to the same extent as any nongovernmental entity.

(b) The legal or beneficial owner of an exclusive right under a copyright is entitled, subject to the requirements of section 411, to institute an action for any infringement of that particular right committed while he or she is the owner of it. The court may require owner to serve written notice of the action with a copy of the complaint upon any person shown, by the records of the Copyright Office or otherwise, to have or claim an interest in the copyright, and shall require that such notice be served upon any person whose interest is likely to be affected by a decision in the case. The court may require the joinder, and shall permit the intervention, of any such person having or claiming an interest in the copyright.

(c) For any secondary transmission by a cable system that embodies a performance or a display of a work which is actionable as an act of infringement under subsection (c) of section 111, a television broadcast station holding a copyright or other

license to transmit or perform the same version of that work shall, for purposes of subsection (b) of this section, be treated as a legal or beneficial owner if such secondary transmission occurs within the local service area of that television station.

(d) For any secondary transmission by a cable system that is actionable as an act of infringement pursuant to section 111(c)(3), the following shall also have standing to sue: (i) the primary transmitter whose transmission has been altered by the cable system; and (ii) any broadcast station within whose local service area the secondary transmission occurs.

(e) With respect to any secondary transmission that is made by a satellite carrier of a primary transmission embodying the performance or display of a work and is actionable as an act of infringement under section 119(a)(5), a network station holding a copyright or other license to transmit or perform the same version of that work shall, for purposes of subsection (b) of this section, be treated as a legal or beneficial owner if such secondary transmission occurs within the local service area of that station.

(As amended Oct. 31, 1988, P. L. 100-568, § 10(a), 102 Stat. 2860; Nov. 16, 1988, P. L. 100-667, Title II, § 202(3), 102 Stat. 3957; Nov. 15, 1990, P. L. 101-553, § 2(a)(1), 104 Stat. 2749; Dec. 1, 1990, P. L. 101-650, Title VI, § 606(a), 104 Stat. 5131.)